152 U.S. 691

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1067.

MAX SCHOENFELD ET AL., PLAINTIFFS IN ERROR,

vs.

FRANCIS HENDRICKS, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 24, 1893.

(15,451.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 24, 1893.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Max Schoenfeld *et al.*, plaintiffs, and Francis Hendricks, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 20th day of November, 1893, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of October, [L. S.] in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

2 [Endorsed:] E. & A. B. 1179. Supreme Court of the United States. Max Schoenfeld *et al.*, plaintiffs in error, *vs.* Francis Hendricks, defendant in error. Writ of error. Curie, Smith & Mackie, attorney- for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 23d day of October, 1893. Edward Mitchell, U. S. attorney & attorney for defendant in error. T. G.

[File-mark:] U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to twenty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Max Schoenfeld, David Schoenfeld, Louis Loeb, and Ferdinand Loeb, plaintiffs in error, against Francis Hendricks, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this thirteenth day of November, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 U. S. Circuit Court, Southern District of New York.

MAX SCHOENFELD, DAVID SCHOENFELD, LOUIS LOEB, and FERDINAND L. LOEB, Plaintiffs,
against
FRANCIS HENDRICKS, Collector of the Port of New York, Defendant. } Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Aug. 10th, 1892.

CURIE, SMITH & MACKIE,
Plaintiffs' Attorneys.

Post-office address and office, No. 46 Exchange place, New York city.

4 United States Circuit Court, Southern District of New York.

MAX SCHOENFELD, DAVID SCHOENFELD, LOUIS LOEB, and FERDINAND L. LOEB
vs.
FRANCIS HENDRICKS, Collector of the Port of New York.

The plaintiffs above named, by Curie, Smith and Mackie, their attorneys, for complaint against the defendant show to the court:

1st. That the plaintiffs are copartners under the firm name of Loeb & Schoenfeld, carrying on business as importers of embroideries at the city of New York.

2nd. That the defendant is the United States collector of customs at the port of New York.

3rd. That on or about the 7th day of November, 1891, plaintiffs imported from St. Gall., Switzerland, and duly entered for warehouse at the port of New York, three cases of cotton embroideries.

4th. That thereafter the invoice of said goods was transmitted by the defendant, as collector, to the appraiser of the port of New York, for appraisement of the merchandise therein described.

5th. That the appraisement of said goods by said appraiser was not conducted according to law; that said appraiser did not ascertain, estimate and appraise, by reasonable ways and means, the actual market value and wholesale price of said merchandise
5 at the time of exportation to the United States in St. Gall., which is the principal market of Switzerland, the country from which the same was imported; that said appraiser made no attempt to appraise the market value, but proceeded in an irregular manner and by arbitrary methods to appraise the cost of production of such merchandise; that the method of appraisement pursued by said appraiser was irregular, arbitrary, contrary to law, and contrary to his own knowledge and judgment.

6th. That the said appraiser, as the result of the arbitrary, irregular and illegal appraisement above set forth, made an addition to the value of said merchandise, as declared in said invoice, of three per cent., purporting to be for general expenses.

7th. That thereafter the defendant, as collector, liquidated the duties upon plaintiffs' said importation, by assessing the rate of duty provided by law upon the advanced valuation returned by said appraiser, based upon said arbitrary, irregular and illegal appraisement, which liquidation, therefore, plaintiffs allege to be wholly illegal, null and void.

8th. That thereafter said defendant, as collector, still having all or a portion of plaintiffs' said goods in his possession and custody, as said collector, compelled plaintiffs, in order to obtain possession of their merchandise, to pay as additional duties demanded by said defendant, in pursuance of his illegal liquidation, the sum of twenty-one dollars.

9th. That said sum of twenty-one dollars, illegally and by duress exacted from plaintiffs by defendant, was paid by plaintiffs under protest.

6 Wherefore, plaintiffs demand judgment against said defendant, for the sum of twenty-one dollars, besides the costs of this action.

Dated New York, Aug. 8th, 1892.

CURIE, SMITH & MACKIE,
Plaintiffs' Attorneys, 46 Exchange Place, New York.

(Endorsed:) N. S., 18515. United States circuit court, southern district of N. Y. Max Schoenfeld, David Schoenfeld, Louis Loeb

in this action, and that he recover the sum of $89.35, his taxed costs, and have execution therefor.

Judgment signed this 6th day of October, 1893.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) 18515. United States circuit court. Max Schoenfeld, David Schoenfeld, Louis Loeb, and Ferdinand L. Loeb
12 *vs.* Francis Hendricks. Judgment-roll. Edward Mitchell, United States attorney, attorney for defendant. U. S. circuit court. Filed Oct. 6, 1893. John A. Shields, clerk.

13 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

MAX SCHOENFELD *et al.*
vs.
FRANCIS HENDRICKS. } Bond for Damages and Costs.

Know all men by these presents that we, Ferdinand L. Loeb, one of the plaintiffs herein, and William H. Northup, are held and firmly bound unto the above-named Francis Hendricks in the sum of one hundred and seventy-eight $\frac{70}{100}$ dollars, to be paid to the said Francis Hendricks; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the sixteenth day of October, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas the above-named Max Schoenfeld and others have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Max Schoenfeld & others shall prosecute their writ of error to effect and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

FERDINAND L. LOEB.
WILLIAM H. NORTHUP.

Sealed and delivered and taken and acknowledged this 16th day of October, 1893, before me—

H'Y SMITH,
[L. S.] *Notary Public, N. Y. C.*, 283.

14 UNITED STATES OF AMERICA, } ss:
Southern District of New York,

Ferdinand L. Loeb and William H. Northup, being duly sworn, depose and say each for himself that he is worth the sum of four hundred dollars over and above all his just debts and liabilities.

FERDINAND L. LOEB.
WM. H. NORTHUP.

Sworn to this 16th day of October, A. D. 1893, before me—

H'Y SMITH,
Notary Public, N. Y. C., 283.

(Endorsed:) U. S. circuit court, southern district of New York. Max Schoenfeld *et al. vs.* Francis Hendricks. Bond for damages and costs on writ of error. Curie, Smith & Mackie, pl'ffs' att'ys, 46 Exch. Pl., New York. Approved as to form and sufficiency Oct. 23, 1893. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

15 United States Circuit Court, Southern District of New York.

MAX SCHOENFELD, DAVID SCHOENFELD, LOUIS LOEB, and FERDINAND L. LOEB, Plaintiffs,
vs.
FRANCIS HENDRICKS, Collector of the Port of New York, Defendant.
(N. S., 18515.)

In the action above entitled, brought by plaintiffs, importers of merchandise, to recover from the defendant, collector of customs at the port of New York, moneys exacted as duties in excess of what plaintiffs claim to have been the lawful rate of merchandise imported subsequent to August 1st, 1890, the plaintiffs claiming in their complaint that the appraisement of the market value upon which the collector's liquidation was based was irregular and illegal and said liquidation thereof null and void, the question arose upon a demurrer to the complaint whether under section 29 of the act of June 10th, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues" (26 U. S. Stat. at Large, p. 131), the circuit court had any jurisdiction to hear and determine said action.

The circuit court sustained the demurrer to the complaint and determined upon the question presented that it had no juris-
16 diction to hear and determine the issues sought to be raised by said complaint, and now certifies this jurisdictional question to the Supreme Court of the United States under the 5th section of the act of March 3rd, 1891, chapter 517, 26 U. S. Stat., 827.

E. H. LACOMBE.
U. S. Circuit Judge.

(Endorsed:) N. S., 18515. United States circuit court, southern district of New York. Max Schoenfeld, David Schoenfeld, Louis Loeb, and Ferdinand Loeb, plaintiffs, *vs.* Francis Hendricks, collector of the port of New York, defendant. Certificate. Curie, Smith & Mackie, att'ys for importers, # 46 Exchange place, N. Y. city. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

17 Supreme Court of the United States.

MAX SCHOENFELD, DAVID SCHOENFELD, LOUIS LOEB, & FERDINAND L. LOEB, Plaintiffs,
vs.
FRANCIS HENDRICKS, Collector of the Port of New York, Defendant.
(N. S., 18515.)

Assignment of Errors.

The plaintiffs in error above named assign for error:

I. The determination of the circuit court that it had no jurisdiction to hear and determine the matters set forth in the complaint on the merits.

II. The determination by said court that section 25 of the act of June 10th, 1890; entitled "An act to simplify the laws in relation to the collection of the revenues" (U. S. Stat. at Large, p. —), protected the defendant, collector of customs, from a suit to recover excessive duties founded on an irregular and illegal appraisement.

III. The decision of said court sustaining the demurrer to the complaint herein.

18 IV. The granting of final judgment in favor of the defendant in error on said demurrer.

CHARLES CURIE,
Attorney for Plaintiffs in Error.

(Endorsed:) Supreme Court of the United States. Max Schoenfeld, David Schoenfeld, Louis Loeb, and Ferdinand Loeb, plaintiffs, *vs.* Francis Hendricks, collector of the port of New York, defendant. (N. S., 18515.) Assignment of errors. Charles Curie, attorney for appellants, # 46 Exchange place, N. Y. city. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

19 Supreme Court of the United States.

MAX SCHOENFELD *et al.*, Plaintiff- in Error,
vs.
FRANCIS HENDRICKS, Defendant in Error.
N. S., 18515. Joinder in Error.

And afterwards, to wit, on the fourth Monday of October, in said term, the said defendant in error, by Edward Mitchell, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDW'D MITCHELL,
U. S. Att'y, Attorney for Defendant in Error.

(Endorsed:) N. S., 18515. United States Supreme Court. Max Schoenfeld *et al.*, plaintiffs in error, *vs.* Francis Hendricks, defendant in error. Joinder in error. Edw'd Mitchell, U. S. attorney & attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 23rd day of Oct., 1893. Curie, Smith & Mackie, attorneys for plaintiffs in error. To Curie, Smith & Mackie, Eqs., attorneys for plaintiffs in error. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

20 UNITED STATES OF AMERICA, *ss:*

To Francis Hendricks, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the third Monday of October, eighteen hundred and ninety-three, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Max Schoenfeld and others are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated New York, Oct. 23, 1893.

E. H. LACOMBE,
U. S. Circuit Judge.

CHARLES CURIE,
Attorney for Plaintiffs in Error.

(Endorsed:) N. S., 18515. U. S. Supreme Court. Max Schoenfeld, David Schoenfeld, Louis Loeb, and Ferdinand Loeb, plaintiffs in error, against Francis Hendricks, collector of the port of New York, defendant in error. Citation. Charles Curie, attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 23rd day of October, 1893. Edward Mitchell, U. S. attorney & attorney for defendant in error. U. S. circuit court. Filed Oct. 23, 1893. John A. Shields, clerk.

[Endorsed:] Circuit court of the United States for the southern district of New York. Max Schoenfeld *et al.*; pl'ffs in error, *vs.* Francis Hendricks, def't in error. Transcript of record.

Endorsed on cover: Case No. 15,451. S. New York C. C. U. S. Term No., 1067. Max Schoenfeld *et al.*, plaintiffs in error, *vs.* Francis Hendricks, collector of the port of New York. Filed November 24th, 1893.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

UNITED STATES SUPREME COURT.

MAX SCHOENFELD ET AL.,
Plaintiffs in Error,

vs.

FRANCIS HENDRICKS,
Defendant in Error.

No. 1067.

And now, January 8th, 1894, come the plaintiffs in error by W. Wickham Smith, their attorney, and move the Court to advance the above-named cause to be heard at the present term at such time as may be convenient for the Court.

This is an action at law brought by importers of merchandise against the Collector of the Port of New York to recover duties alleged to have been exacted by him in excess of the lawful rate on certain merchandise imported by them after August 1st, 1890. The gist of the importers' complaint is that an irregular and illegal method of appraisement was pursued by the appraising officers, and that the liquidation of duties by the Collector, based on such appraisement, was void. A demurrer, interposed on behalf of the Collector, that the Circuit Court had no jurisdiction to entertain such a suit, was sustained by the Circuit Court, which has certified this jurisdictional question to this Court.

The question involved in the case is whether the Circuit Court has any jurisdiction to entertain such an action in view of the provision of Section 25 of the

Customs Administrative Act, above cited, that, "from and after the taking effect of this act, no Collector * * * shall be in any way liable to any * * * importer * * * for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon * * * or any other matter or thing as to which said * * * importer * * * might under this act be entitled to appeal from the decision of said Collector or other officer, or from any Board of Appraisers provided for in this act," the importers claiming that, inasmuch as under the ruling of this Court in Passavant vs. The United States, 148 U. S., 214, they have no right of appeal from the decision of the Board of General Appraisers; their right to sue the Collector is not affected by the section above quoted.

The record in the case has already been printed.

The grounds upon which this motion to advance is made are:

1st. That this case is entitled to advancement under Rule 32 of this Court, a question of the jurisdiction of the Circuit Court being involved.

2d. This case relates to the same general subject matter as that of case No. 1066, in which a motion to advance has been made by the Solicitor-General, and it would be a saving of time for the Court if the two causes should be submitted together.

3d. An early determination of the jurisdictional question involved is desirable, in order that if the decision of the Circuit Court on this question be correct multiplicity of litigation may be prevented, and that if such decision be incorrect this and similar actions may be brought to trial on the merits.

W. WICKHAM SMITH,
Attorney for Plaintiffs in Error.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1893.

MAX SCHOENFELD ET AL.,
Plaintiffs in Error,

vs.

FRANCIS HENDRICKS, Collector, &c.,
Defendant in Error.

This is a proceeding to review by writ of error a judgment of the United States Supreme Court for the Southern District of New York sustaining a demurrer to a complaint on the ground of want of jurisdiction.

STATEMENT.

The action was brought by plaintiffs in error, importers of New York City, against the defendant in error, who was Collector of the Port of New York, to recover a sum of money exacted from them as duties under duress of goods. The complaint (Rec., fols. 4-6) sets forth an importation, an irregular and illegal appraisement, a liquidation based thereon, and the exaction of an additional duty based on said liquidation as a condition precedent to the release of plaintiffs' goods.

The defendant demurred to the complaint on two grounds (fol. 7).

1st. That the complaint did not state facts sufficient to constitute a cause of action.

2d. That the Circuit Court had no jurisdiction of the cause of action.

The demurrer was sustained on the latter ground (see Decision, Rec., fol. 9), and the jurisdictional question certified to this Court (see Certificate, fols. 15, 16).

Specification of Errors.

The Circuit Court erred in sustaining the demurrer and holding that it had no jurisdiction to try the cause, and in not hearing and determining the cause on the merits.

I.

The question here presented is whether in August, 1892, the Circuit Court had jurisdiction of an action by importers against a Collector of Customs to recover moneys claimed to be illegally exacted as duties, the ground of complaint being that the appraisement of the goods was irregular and illegal.

By Article 3, Section 2, of the Constitution it is provided "the judicial power shall extend to all cases in law and equity arising under * * * the laws of the United States," &c.

By Section 629, Revised Statutes, Subdivision 4, the Circuit Court is given original jurisdiction of "all suits in law or in equity arising under any act providing for revenue from imports or tonnage," &c.

II.

A Collector of Customs was suable at common law for money extorted *colore officii* from a merchant, and paid under protest. This Court so decided in 1836 in Elliott vs. Swartwout, 10 Peters, 137.

In 1839 a statute was enacted by Congress which provided:

"That from and after the passage of this act all money paid to any Collector of the Customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other moneys paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the Treasurer, kept and disposed of; and it shall not be held by said Collector, or person acting as such, to await any ascertainment of duties or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury that in any case of unascertained duties, or duties paid under protest, more money has been paid to the Collector, or to the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the over-payment, directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated."

In 1844 this Court decided in the case of Cary vs. Curtis (3 How.,236) that the effect of this legislation was to debar the importer from maintaining *an action in assumpsit for money had and received* to recover moneys paid as duties under protest. This decision has often been cited as authority for the prop-

osition that Congress had by this act abolished the right to sue the Collector altogether, and the reporter's head-note of the decision has furnished some excuse for this error, but, as will be seen from the portion of the opinion quoted below, the Court not only *decided nothing of this kind*, but expressly, and almost vehemently, disclaimed any intention to so decide. The Court said :

" The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, ei her by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. *The legitimate inquiry before this Court is not whether all right of action has been taken away from the party, and the Court responds to no such inquiry.* The question presented for decision, and *the only question decided*, is whether, under the notice given by the Statute of 1839, payments made in despite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation, which are inseparable from, and indeed are the only foundation of, a right of recovery in *this particular form of action.* And here is presented the answer to the assertion that by the Act of 1839, or by the construction given to it by this Court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. *Neither have Congress nor this Court furnished the slightest ground for the above assertion.*"

On the 26th day of February, 1845, Congress passed a statute giving a right of action to recover duties paid under protest (U. S. Stat. at Large, Vol. 5, p. 727). This statute was incorporated in the revision of the statutes as Section 3011. On June 30th, 1864, another statute was passed limiting and restricting this right of

action (13 U. S. Stat. at Large, p. 214), which was incorporated in the revision as Section 2931. Both these sections of the Revised Statutes are expressly repealed by Section 29 of the Customs Administrative Act of June 10th, 1890 (26 U. S. Stat. at Large, p. 131).

The repeal of these laws leaves the importer just where he was before they were enacted; just where he was when the opinion in the case of Cary vs. Curtis was filed in the office of the Clerk of this Court. Rights not created by a statute cannot be taken away by the repeal of the statute.

III.

But it is contended that a suit against the Collector is expressly prohibited by Section 25 of the Customs Administrative Act of June 10, 1890. That section is as follows:

"That from and after the taking effect of this act no Collector or other officer of the customs shall be in any way liable to any owner, importer, consignee or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise, or the duties charged thereon, or the collection of any dues, charges or duties on or on account of said merchandise, or any other matter or thing *as to which said owner, importer, consignee or agent of such merchandise might, under this act, be entitled to appeal from the decision of said Collector or other officer, or from any Board of Appraisers provided for in this act.*"

But the importer has no right of appeal from a decision of the Board of General Appraisers in a case which does not relate to the classification of merchandise or the rate of duty chargeable thereon.

Passavant vs. U. S., 148 U. S., 214.

A statute prohibiting a suit where another remedy is provided can have no reference to a cause of action for which no other remedy is provided. It has been suggested that a remedy is provided by Section 14 of the Customs Administrative Act, in that an appeal from the Collector's decision on liquidation may be taken to the Board of General Appraisers. But a moment's consideration will show the absurdity of this suggestion. By Section 13 of the act the decision of the Board of General Appraisers, as to the value of merchandise is made final and conclusive and binding upon the Collector. If they have pursued irregular or illegal methods, or, to make an extreme supposition, have been guilty of fraud or corruption, and the Collector liquidates the duties according to their decision, what a mockery it would be to have the importer appeal from the Collector's action to the very board whose conduct constituted the gravamen of his complaint, and have their decision final. It is inconceivable that Congress contemplated such an absurdity and no statute should be so construed as to produce such a result, even where its language would seem to require it. Congress intended the new system to give all the relief which the old one had afforded, and *only to the extent that the new system furnished relief equivalent to that of the old system repealed by Section 25.*

It is submitted that under the laws in force at the time this suit was brought an action lay against a Collector for duties paid under protest, and to get possession of goods where the question involved did not relate to the classification of merchandise.

III.

The right to sue in cases of this character is abundantly established. An appraisment is null and void if not regularly conducted according to law, and in the absence of a valid appraisement duty can be assessed only on the invoice value.

Oelbermann vs. Merritt, 123 U. S., 356.
Greely vs. Thompson, 10 How., 225.
Converse vs. Burgess, 18 How., 413.
Oberteuffer vs. Robertson, 116 U. S., 499.
Badger vs. Cusimano, 130 U. S., 39.
Robertson vs. Frank Bros., 132 U. S., 17.

The rule is well expressed in the case last cited as follows:

"But it is contended that the act of the appraiser in making, or requiring to be made, the additional charges for transportation and labor was final and conclusive, and cannot be made the subject of inquiry. It is undoubtedly the general rule that the valuation of merchandise made by the appraiser, unappealed from to merchant appraisers, is conclusive. *But, whilst this is the general rule, it is subject to the qualification that, if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable.* This qualification appiles to the acts of many other officials charged with duties of a similar character, such as assessors of the value of property for taxation, commissioners for appraising lands taken for improvements or damages sustained by owners of land and the like."

The right to review an irregular and illegal appraisement and recover duties exacted thereon existed when the customs' administrative law was enacted. Such right had formerly been exercised by suing the Collector. The administrative law took away the right to sue the Collector only where a substitute remedy was provided by other parts of the act. This Court has

decided that no substitute remedy was provided for this particular species of grievance (Passavant vs. United States, *supra*). Therefore, the right to sue the Collector for it still exists, and the Constitution and Laws of the United States designate the Circuit Court as the proper forum. The action was, therefore, properly brought and was maintainable there.

IV.

The judgment of the Circuit Court sustaining the demurrer should be reversed, and the cause remanded to that Court with instructions to proceed according to law.

Dated New York, December 31st, 1893.

W. WICKHAM SMITH,
Counsel for Plaintiffs in Error.

Office Supreme Court
FILED.
FEB 15 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

MAX SCHOENFELD ET AL., PLAINTIFFS in error,
v.
FRANCIS HENDRICKS, COLLECTOR OF the port of New York.
No. 1067.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

MAX SCHOENFELD ET AL., PLAINTIFFS in error,
v.
FRANCIS HENDRICKS, COLLECTOR OF the port of New York.
No. 1067.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

I.

Under the provisions of section 3010 of the Revised Statutes the defendant in error, as collector of the port of New York, was required to pay, and must therefore be presumed to have paid into the Treasury of the United States, the money that he collected from the plaintiffs in error, which they are seeking by this action to recover from him. He is therefore not liable by the common law to the action (*Cary* v. *Curtis*, 3 How., 236), (1844). As

was said by Mr. Justice Matthews in *Arnson* v. *Murphy*, 109 U. S., 238, 240, (1883), where he reviews the legislative and judicial history of this subject·

> The common-law right of action to recover back money illegally exacted by a collector of customs as duties upon imported merchandise, rested upon the implied promise of the collector to refund money which he had received as the agent of the Government, but which the law had not authorized him to exact; which had been unwillingly paid, and which, before payment to his principal, he had been notified he would be required to repay; and *involved a corresponding right on his part to withhold from the Government, as an indemnity, the fund in dispute.* The manifest public inconveniences resulting from this situation induced Congress, by the Act of March 3, 1839, chapter 82, 5 Statutes, 348, section 2 [equivalent of Revised Statutes, section 3010], to alter the relation between these officers and the United States by requiring them peremptorily to pay into the Treasury all moneys received by them officially, without regard to claims for erroneous and illegal exactions. * * * *The legal effect of this enactment, as was held in Carey* v. *Curtis*, 3 *How.*, 236, *was to take from the claimant all right of action against the collector by removing the ground on which the implied promise rested.*

The following is the language of the section:

> SEC. 3010. All money paid to any collector of the customs, or to any person acting as such, for unascertained duties or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, and shall not be held by the collector, or person acting as such, to await any ascertainment of duties, or

> the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid.

It may be, as claimed by counsel for the plaintiffs in error, that the effect of section 3010, standing alone, is not to take away *all* right of action by the importer against the collector. In the passage quoted by counsel from the opinion in *Cary* v. *Curtis*, it is intimated that the importer might have the right, notwithstanding the provisions of that section, to take possession of his goods from the collector by replevin, or by an action of detinue or trover, upon tendering the amount of duties admitted by him to be legally due; but that is the extent of his remedy. The importer can not pay the collector and then turn upon him to hold him liable for money which he is obliged by law to pay into the public treasury.

II.

Not only is there no statute permitting the action at bar, section 3011 of the Revised Statutes, which authorized an action against a collector to recover money paid as duties "when such amount of duties was not or was not wholly authorized by law," being repealed by section 29 of the Customs Administrative Act of June 10, 1890 (chapter 407); but, by section 25 of the latter act, it is declared that the remedies which it affords to importers by appeal to the Board of Appraisers, etc., shall be exclusive.

> SEC. 25. That from and after the taking effect of this act no collector or other officer of the customs

> shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act.

Counsel for the plaintiffs in error read this section as if it covered only rulings of the collector, from which an appeal lies ultimately to the circuit court. Such is not its language. It was evidently the purpose of Congress to relieve collectors from any and all suits for their official acts respecting duties on imported merchandise. This exemption of the collector from suit especially covers:

1. Any rulings or decisions as to the classification of merchandise.

2. As to the duties charged thereon.

3. The collection of any dues, charges, or duties on or on account of said merchandise.

4. Any other matter or thing as to which the importer * * * might, under this act, be entitled to appeal from the decision of said collector *or* other officer, *or* from any board of appraisers provided for in this act.

The purpose of Congress to remit all questions of *valuation* to the final determination of the board of appraisers, and to relieve the courts from ever dealing with that subject (*Passavant* vs. *United States*, 148 U. S., 214), is made

more manifest by the fact that the following proposed amendment to section 25 was voted down:

> *Provided always*, That said collector or other officer of customs shall be liable to the party aggrieved in case the ruling, decision, or other action of such collector or other officer is fraudulent. (21 Cong. Rec., 845.)

III.

The cases cited by counsel for the plaintiffs in error, on page 7 of his brief, are not in point. They are decisions made while section 3011 of the Revised Statutes was in force, which hold that an appraisement by a merchant appraiser, not possessing the qualifications prescribed by statute, or an appraisement made contrary to the directions of the statute, may be impeached *in the action at law provided by section* 3011 *of the Revised Statutes.* But even if section 3011 were still in force, no case of want of jurisdiction is made out by the complaint, with respect to the proceedings either of the appraiser or of the collector. There is a free use of epithets, such as "irregular," "arbitrary," "illegal," and "null and void," but no facts are alleged to justify them. The decision complained of was that of an appraiser in appraising the foreign dutiable value of merchandise. But the appraiser's decision was binding upon the defendant in error as collector, and the importers, not having availed themselves of the remedies to correct the supposed error, given by section 13 of the Customs Administrative Act, by an appeal to a general appraiser, and from his decision to the Board of General Appraisers, it can not be said that the exaction by the

collector of duties on the addition made by the appraiser to the invoice value was illegal. As was said by Mr. Justice Davis in *Nichols* v. *United States* (7 Wall., 122, 127):

> The appellants say they [the duties] were illegally exacted, because it was decided by this court, in *Lawrence* v. *Caswell*, that the duties ought to be charged only upon the quantity of liquors actually imported, and not on the contents stated in the invoices; but the Chief Justice took occasion to observe in deciding that case, "that where no protest was made the duties are not illegally exacted in the legal sense of the term. If the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal (the Secretary of the Treasury) to which the law had confided the power of deciding the question."

I submit—

(1) That the action does not lie at common law, in view of the obligation of the defendant under Revised Statutes, section 3010, to pay the money into the Treasury.

(2) That it is not authorized by statute; but, on the contrary, is expressly forbidden by section 25 of the Customs Administrative Act of June 10, 1890, and

(3) That the question of jurisdiction certified to this court should consequently be answered in the negative.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

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